APPENDIX A

IN THE UNITED STATES DISTRICT COURT

(Caption — No. 71 H Cr. 94)

JUDGMENT AND COMMITMENT

On this 20th day of October, 1972 came the attorney for the government and the defendant appeared in person and by counsel, F. Laurence Anderson, Jr.

It Is Adjudged that the defendant upon his plea of not guilty, and a verdict of guilty has been convicted of the offense of Title 26, Section 7201 — Evasion of Wagering Taxes as charged in 12 Counts of Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years as to each of Count 3 and 4 through 13, to run concurrently. Defendant fined $5000.00 as to Count 3 only. Sentence withheld as to Count 14 and defendant placed on probation for a period of Five (5) years to begin upon release.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

(Argued September 19, 1973)
December 5, 1973.

Before

Hon. Thomas E. Fairchild, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. A. Sherman Christensen, Senior District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 72-1964 vs.

REGINALD BOYD,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana.

No. 71-H-CR-94
George N. Beamer, Judge.

ORDER

This appeal presents the question whether defendant's acquittal by jury verdict on two counts of a fourteen count

---

* Senior District Judge of the United States District Court for the District of Utah, sitting by designation.

indictment rendered invalid his conviction on the remaining counts by reason of the doctrine of collateral estoppel or the Fifth Amendment guarantee against double jeopardy. The other points raised concerning admissibility of "summary" testimony and claimed insufficiency of instructions have been found to justify little additional discussion in view of the record.

Counts I and II of the indictment against defendant-appellant Reginald Boyd charged that on May 31, 1967, and on June 14, 1968, respectively, in violation of Section 7206(1), Title 26 United States Code,[1] he

> did willfully make and subscribe . . . an Internal Revenue Service Form 11C, Special Tax Return and Application for Registry-Wagering, which was verified by a written declaration and it was made under the penalties of perjury . . . [which] Form 11C, he did not believe to be true and correct as to every material matter in that he did state and represent that there were three persons who received policy wagers on his behalf; whereas at such time the defendant then and there well knew and believed that there were more persons than three who received policy wagers on his behalf. . .

---

[1] § 7206. FRAUD AND FALSE STATEMENTS

Any person who—

(1) *Declaration under penalties of perjury*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . .

* * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Count III through XIV charged in substance that on specified dates between September 9, 1968 and September 24, 1969 defendant, in violation of Section 7201, Title 26, United States Code,[2]

> did willfully attempt to evade and defeat a large part of the tax on wagering due and owing by him to the United States of America . . . [by filing] a false and fraudulent tax on wagering return . . . [wherein both his gross wagers received and the amount of tax due and owing thereon were knowingly understated for each month in question].

Boyd admittedly was engaged in a gambling business in Gary, Indiana, involving the operation of the policy wheel commonly referred to as the "Black-Gold Wheel". He did business under the assumed name "Black Gold". There was testimony that the Black Gold Wheel employed over 20 betting station operators or other agents, many of whom testified that they received and accepted wagers. Three of these alleged operators or agents were listed on Form 11C, involved in Counts I and II. There was evidence from which the jury could have found that others as well received wagers in substantial sums as agents of defendant.

Defendant contends that by acquitting him on Counts I and II the jury necessarily found either that there were only three persons in fact receiving wagers on his behalf

---

[2] § 7201. ATTEMPT TO EVADE OR DEFEAT TAX

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(and therefore required to be listed on his Forms 11C), or that he did not know, and could not have known, that wagers were being accepted purportedly on his behalf by persons other than the three listed on his Forms 11C. Based on the foregoing assumption he argues that questions of fact essential to verdicts of guilty in Counts III through XIV were determined in his favor and precluded the return of the latter "inconsistent" verdicts. Dunn v. United States, 284 U.S. 390 (1932), is to the contrary and continues in our opinion to represent the law to be applied to the facts of the present case. Mr. Justice Holmes, speaking for the court said: "That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters." Moreover, having found as of the dates charged in Counts I and II that there was none who had received policy wagers on defendant's behalf other than those persons included in his 11C return, consistency did not necessarily require that jury to reach the same conclusion with respect to the substantially later dates charged in the other counts; even though on the dates charged in the first two counts he may not have considered others technically his agents and employees and thus may not have willfully omitted them from the form, he thereafter could have established or become cognizant of such additional relationships and willfully attempted to avoid taxes based on collections known to have been made on his behalf and for which he knew there was an additional tax owed by him. Aside from these speculations, and notwithstanding observations made with reference to the next point to be discussed, we think that as to different counts contained in the same indictment tried together, the deliberations of the same jury may not be inquired into for consistency or for grounds of collat-

eral estoppel with the effect sought by defendant in this case.

Defendant places primary reliance upon Ashe v. Swenson, 397 U.S. 436 (1970), to support his argument of collateral estoppel as part of the Fifth Amendment's guarantee against double jeopardy. It was there held that since a jury in the first trial had determined by its verdict that the petitioner was not one of the robbers in question, the State under the doctrine of collateral estoppel was constitutionally foreclosed from relitigating that issue in another trial. Some of the reasoning in *Dunn*[3] may have been weakened by *Ashe*.[4] But it is clear that *Ashe*, in its doubt jeopardy context, has reference to separate trials

---

[3] "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it were a separate indictment [citations omitted]. If separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as res judicata of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold. . . ." (284 U.S. at 393.)

[4] "Once a jury had determined upon conflicting testimony that there was at least a reasonable doubt that the petitioner was one of the robbers, the State could not present the same or different identification evidence in a second prosecution for the robbing of Knight in the hope that a different jury might find that evidence more convincing. The situation is constitutionally no different here, even though the second trial related to another victim of the same robbery." (397 U.S. at 446.)

and not to the situations of *Dunn* and the present case, where single indictments and trials were involved.[5]

The constitutional concept of double jeopardy is generally considered to involve protection only against successive prosecutions or trials for the same offense, Ashe v. Swenson, *supra* at 446; North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Green v. United States, 355 U.S. 184, 187 (1957); Ferguson v. Caldwell, 452 F.2d 1011, 1012 (6th Cir. 1971); Dear Wing Jung v. United States, 312 F.2d 73, 15 (9th Cir. 1962). But see dicta United States v. Marzani, 71 F. Supp. 615, 618 (D.C. D.C. 1947). We do not have here successive trials or prosecutions for the same offense. *Ashe* neither mentions nor by implication overrules the doctrine of *Dunn*. As heretofore observed, the latter case is controlling here. Moreover, we have already noted that in the present case there were rational reasons why there could have been different results between Counts I and II and Counts III to XIV, while in *Ashe* the court recognized that there was only one possible result possessing rationality.[6]

---

[5] "The question is not whether Missouri could validly charge the petitioner with six separate offenses for the robbing of the six poker players. It is not whether he could have received a total of six punishments if he had been convicted in a single trial of robbing the six victims. It is simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again." (*Id.*)

[6] "The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not. The federal rule of law, therefore, would make a second prosecution for the robbery of Roberts wholly impermissible." (397 U.S. at 445.)

Defendant complains about the admission of summary testimony from an Internal Revenue agent developing a computation of the effect of evidence from prior witnesses on assumptions the validity of which was left to the jury. The propriety of this type of testimony under suitable circumstances and with appropriate instructions, both revealed by the record here, has long been recognized. United States v. Johnson, 319 U.S. 503, 519 (1943); United States v. Tolbert, 406 F.2d 81, 85 (7th Cir. 1969); United States v. Bernard, 287 F.2d 715, 722 (7th Cir.), *cert. denied,* 366 U.S. 961 (1961).

Defendant's final contention is that the trial court erred in failing to call to the jury's attention the provisions of 26 U.S.C. § 4401(c) and internal revenue regulations issued pursuant thereto with reference to persons liable for the tax on wagering through the activities of agents. At the time for taking exceptions defendant's counsel stated not only that he had no objection to the charge as given but also that he had no request for additional instructions. Defendant seeks to avoid the consequence of Rule 30, Fed. R. Crim. P. by the assertion that the claimed insufficiency of the charge was plain error within the contemplation of Rule 52(b). Particular complaint is now made of failure to expressly tell the jury in the words of Internal Revenue Regulation 44-4401-2 that "[a]ny wager or contribution received by an agent or employee on behalf of such person shall be considered to have been accepted by and placed with such person [a person engaged in the business of accepting wagers]." Defendant's argument is not clear. If he contends that use of the phrase "agent or employee" was intended to exclude liability for wagers accepted on defendant's behalf by independent contractors, we find no basis for such a distinction. Nor was the

requested instruction necessary to permit the jury to give weight to the testimony of the sixteen government witnesses who denied they were employed by or agents for defendant to accept wagers on his behalf. The jury was instructed that the evidence must show beyond a reasonable doubt that defendant received a substantial part of the wagers relied on by the government. If the jury believed that the government witnesses were accepting wagers and forwarding the proceeds to defendant, then those witnesses were defendant's agents for purposes of this statute.

AFFIRMED.